BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	No. 92R-0088-JG
LILLIAN PRICE TRUST	)	

For Appellant:	Susan O. Cain John H. Mullen KPMG Peat Marwick
For Respondent:	H. Kent Holman Counsel

O P I N I O N

This appeal is made pursuant to section 19057, subdivision (a),[1/] of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Lillian Price Trust for refund of personal income tax in the amount of $52,445.60 for the taxable year ended March 31, 1987.

[1/] Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the year in issue.

The facts of the appeal are not in dispute. In December 1986, the Wells Fargo Bank, as trustee, and the certified public accounting firm of KPGM Peat Marwick (Peat) entered into an arrangement whereby Peat would prepare trust income tax returns which the trustee itself had previously prepared. Twenty thousand (20,000) returns were involved. Appellant states that the responsibility for the preparation of the returns shifted in stages over the eight-month period beginning in December 1986 and ending in July 1987.

Appellant describes the procedural precautions, which it terms "extraordinary," employed in transferring return preparation responsibility from the bank to Peat as follows:

> The first step in the transition involved compilation of a microcomputer listing of tax return due dates, which listing was derived from due date lists previously maintained by tax preparers at Wells Fargo Bank and its predecessors.
>
> The microcomputer due date listing was then compared to the tax return files for each of the 20,000 trusts to identify any differences. All differences were exhaustively investigated and cleared by either entering the proper return due date on the microcomputer listing or by concluding that a tax return was not required (e.g., final return filed, custodial account, etc.). We have subsequently reviewed the procedure and are unable to determine any additional action that we could have implemented. (Emphasis in original.)

(Appeal Ltr. at 2.)

Unfortunately, to again quote appellant, "Despite these extensive, well planned, and tested transition procedures, the return in question was omitted from the microcomputer due date listing. In fact, this was the only tax return out of 20,000 which was not prepared and timely filed." (Appeal Ltr. at 2.) Also, although appellant does not so state, it is apparent that the omission was also not discovered during the process of comparing the due date listing to the tax return files. Subsequently, the trustee discovered the omission, promptly filed the return, and paid the tax and interest due thereon. Because the return was filed late, respondent asserted the penalty provided by section 18681. Appellant paid the penalty and filed a claim for refund of the penalty, which claim respondent denied. This timely appeal followed.

Section 18681 provides as here pertinent:

> (a) If any taxpayer fails to make and file a return required by this part on or before the due date of the return . . . then, unless it is shown that the failure is due to reasonable cause and not due to willful neglect, 5 percent of the tax shall be added to the tax for each month or fraction thereof elapsing between the due date of the return and the date

> on which filed, but the total penalty shall not exceed 25 percent of the tax.

We find no willful neglect here, i.e., we do not believe the failure to timely file was intentional or because of reckless indifference. (United States v. Boyle, 469 U.S. 241, 245 [83 L.Ed.2d 622] 1985).) This leaves the question of whether the untimely filing can be excused by the presence of reasonable cause.

Reasonable cause requires the taxpayer to exercise ordinary business care and prudence. If a taxpayer has exercised such ordinary care and prudence and is nevertheless unable to file the return within the prescribed time, then the delay is due to reasonable cause. (Treas. Reg. § 301.6651-1(c)(1).[2/])

On brief, respondent cites extensively from and relies heavily upon United States v. Boyle, supra. In Boyle, Chief Justice Burger framed the issue in the case as:

> [w]hether a taxpayer's reliance on an attorney to prepare and file a tax return constitutes "reasonable cause" under § 6651(a)(1) of the Internal Revenue Code, so as to defeat a statutory penalty incurred because of a late filing.

(United States v. Boyle, supra, 469 U.S. at 242.)

In Boyle, the court held that such reliance did not constitute reasonable cause for failure to timely file. But, and important to this appeal, the reason the return was not timely filed was "because of a clerical oversight in omitting the filing date from [the attorney's] master calendar." (Emphasis added.) (United States v. Boyle, supra, 469 U.S. at 243.)

In its reply brief, appellant asserts that it has never relied upon Peat to file a timely return, and that Wells Fargo and Peat worked closely together in preparing and filing the returns. (App. Reply Br. at 3 and 4.) This assertion appears to conflict somewhat with statements in appellant's original brief that "Wells Fargo Bank, as trustee, engaged KPMG Peat Marwick to prepare the income tax returns," (Appeal Ltr. at 2), but we believe the difference is not critical.

As we understand it, the thrust of appellant's argument is that Peat's procedures, which resulted in the timely filing of 19,999 returns out of 20,000, demonstrates the ordinary business care and prudence necessary to establish reasonable cause. While this efficiency is impressive, we cannot approve a concept of reasonable cause based upon volume. We have been unable to find support for such a position and appellant has offered none. For good reason, we believe. The immediate question

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[2/] As respondent correctly notes, section 18681 is based upon Internal Revenue Code section 6651, and federal determinations and interpretations are persuasive in applying California law. (Meanly v. McColgan, 49 Cal.App.2d 203, [121 P.2d 45] (1942).)

which would arise under such an approach is what ratio between filed and unfiled returns would be acceptable.[3/]

Nothing in the record before us supplies a reason for the late filing or tells us the party or parties responsible. In its affidavit accompanying the delinquent return, the trustee refers to the late filing as an "aberration." In its reply brief, appellant refers to the omission as "inadvertent." While these descriptions may bear upon the question of willful neglect, we think they do little to assist appellant in carrying its burden to show reasonable cause.

It is doubtless true that with the demanding circumstances present in the filing of a large number of returns, which would necessarily require the efforts of many people, all with their own concerns, mistakes will happen and the cause may never be discovered. But mistake is not reasonable cause. (Factor v. Commissioner, ¶ 58,094 T.C.M. (P-H) (1958), affd., 281 F.2d 100 (1960).) Just forgetting is not reasonable cause. (West Virginia Steel Corporation v. Commissioner, 34 T.C. 851 (1960).) It seems clear that what has happened here is an understandable mistake of some kind but, without more, we cannot find reasonable cause. We do not believe that reasonable cause emerges automatically from the preparation and filing of a large number of returns, yet appellant offers nothing else.

As to the responsibility for timely filing, it is clearly that of the trustee. Boyle, supra, holds that the task to timely file may not be delegated. But appellant has removed that question from our consideration. In its reply brief appellant specifically disclaims any reliance by the trustee upon Peat to file a timely return. (App. Reply Br. at 3, 4.) That, of course, leaves the trustee and it merely tells us of "extraordinary" procedures. These procedures consisted of making a computer list of return due dates from already existing records, and comparing the list with the tax return file folders. No doubt, because of the number of returns involved, the task was arduous, but it hardly seems extraordinary. It is, however, not our function to advise the trustee or Peat on business procedures. What we consider here is the untimely filing of a tax return. We have not been given any satisfactory reason for the late filing and if appellant is unable or unwilling to state the reason, we cannot supply one.

Accordingly, we must sustain respondent's denial of appellant's claim for refund.

[3/] In its reply brief, appellant states: "If there was more than this one return that was filed late, we would not be able to advocate reasonable cause." (App. Reply Br. at 3.) But why not five or 10? Such numbers are still small compared with 20,000. And must one file 20,000 returns in order to get one penalty-free nonfiling? Why not 10,000 or even 5,000? The problems are obvious, and it is clear that orderly tax administration cannot accommodate such a rule.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Lillian Price Trust for refund of personal income tax in the amount of $52,445.60 for the taxable year ended March 31, 1987, be and the same is hereby sustained.

Done at Sacramento, California, this 30th day of November, 1994, by the State Board of Equalization, with Board Members Mr. Sherman, Mr. Fong and Ms. Scott present.

Brad J. Sherman, Chairman

Matthew K. Fong, Member

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